S.B. CIVIL WRIT PETITION NO.3466/2005

Smt. Chandi Bai and others

vs.

Laxmi Lal and another.

Date : 8.7.2005

HON'BLE MR. PRAKASH TATIA, J.

Mr. Jitendra Chopra, for the petitioners.

Ms. Rekha Borana, for the respondent no.1/caveator.

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Heard learned counsel for the parties.

The petitioners submitted an application under Section 10 CPC before the first appellate court where the petitioners' first appeal was pending and wherein the petitioners questioned the order of the trial court not staying the suit proceedings. Before the first appellate court, again application under Section 10 CPC for staying the proceedings of the first appeal has been filed by the petitioner.

According to learned counsel for the petitioner, in earlier filed suit, after decision of trial court and first appellate court, a second appeal has been filed which is pending, therefore, the first appellate court cannot proceed to hear the first appeal arising out of the decision given in subsequently filed suit.

It is not in dispute that the order which was passed by the trial court on application under Section 10 CPC not staying the suit proceedings has been challenged by the petitioners before the first appellate court and that issue is subjudice.

The petitioners submitted this application for staying the appeal proceedings. Thereby the petitioners in fact is seeking stay against the decision on the question whether the trial court should not have proceeded with the suit in view of the pendency of the earlier litigation between the parties. The first appellate court since rejected the petitioners' application under Section 10 CPC for staying proceedings, therefore, the first appellate court will be free to examine the objections of the petitioners about not staying the proceedings of the suit by the trial court.

In these circumstances, the petitioners should not have even moved the application for stay of appeal proceedings and should not have preferred this writ petition as the petitioners' main plea in regular first appeal cannot be made an issue by filing appliation. By the decision of main appeal, the issue raised by the petitioners under Section 10 CPC will be decided by the first appellate court which they have already raised before the first appellate court and is seeking decision on that point by filing appeal.

In view of the above, there is no reason for exercise jurisdiction under Article 227 of the Constitution of India

to interfere in the order of the first appellate court dated 16.3.2005.

Accordingly, this writ petition, having no merit, is hereby dismissed.

(PRAKASH TATIA), J.

S.Phophaliya